No. 87-1361 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER, and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

Appellants,

vs.

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, WESTCHESTER COUNTY BOARD OF ELECTIONS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

Appellee Westchester County Board of Elections will not reiterate the facts recited in the jurisdictional statement, however, certain additional facts should be noted. On November 8, 1987, the election of Family Court Judges in Westchester County was held and the seat occupied by Appellant Kaiser was filled. Judge Kaiser retired on December 31, 1987 and a newly elected judge has taken office.

In the lower Courts, the Westchester County Board of Elections took no position on the merits of this case participating in the litigation only with respect to matters regarding the holding of the election for the Westchester County Family Court. This brief is submitted pursuant to the

request of the Clerk of the Court for a response to the jurisdictional statement.

SUMMARY OF ARGUMENT

The Family Court seat which Appellant Barbara Kaiser occupied was filled at the November, 1987 general election and a newly elected judge succeeded Judge Kaiser on January 1, 1988. Accordingly, to that extent, the case appears moot.

Further, the issues Appellants offer for review are not squarely presented by this case. The constitutional ruling below is based upon a distinction between elected and appointed judges for retirement purposes resulting from the interplay of federal statutory law and New York

constitutional and statutory law. Only federal statutory law, the Age Discrimination in Employment Act, distinguishes between elected and appointed officials. Appellants raise no challenge to the federal law.

The constitutional ruling is also, in part, based upon an administrative interpretation of the Age Discrimination in Employment Act which preceded the commencement of this litigation.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED

A. THE CASE APPEARS MOOT AS TO APPELLANT KAISER

The Westchester Family Court judgeship, previously occupied by the Hon. Barbara Kaiser, an Appellant here, was filled at the November 8,

1987 general election. Upon the mandatory retirement of Judge Kaiser on December 31, 1987, a newly elected judge has assumed office.

Under the circumstances, it appears that the challenge here, insofar as it involves Judge Kaiser's mandatory retirement, has become moot.

B. THE ISSUES SOUGHT TO BE REVIEWED IN THIS COURT ARE NOT SQUARELY PRESENTED

Jurisdictional requirements for review of a State Court decision mandate that the State Court judgment be final as to all parties and issues. 26 U.S.C. §1257; Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548 (1945); Meagher v. Minnesota Thresher Manuf'g. Co., 145 U.S. 608, 611 (1892). It must be clear that a

definitive disposition has been made of all the legal and factual issues in the case. The requirement of finality avoids piecemeal review by the Federal Courts of State Court decisions and avoids giving advisory opinions. North Dakota State Board of Pharmacy v. Snyder Drug Stores, 414 U.S. 156, 159 (1973).

The case at bar does not squarely present the constitutional equal protection issue sought to be reviewed. The appeal does not draw into question the provisions of the Age Discrimination in Employment Act, the only statutory law drawing a distinction between elected and appointed judges, and the rulings below are based upon the effect of an administrative interpretation of that federal law.

The distinction between appointed and elected judges for retirement purposes, on which Appellants seek to appeal, is brought about by the interplay of New York law and a recent amendment to the Federal Age Discrimination in Employment Act as administratively interpreted. 29 U.S.C. §621 et seq.; New York Constitution, Article VI, §25(b); New York Judiciary Law §23.

The only provision of those laws that draws any distinction between elected and appointed officials is the Age Discrimination in Employment Act. 29 U.S.C. §630(f). In this case, however, as observed below by the New York, Appellate Division:

> This statute, however, is not challenged by the plaintiffs, and so is beyond the scope of our review.
>
> Appellant's Appendix, p. 23a.

Appellant's jurisdictional statement continues to confine the challenge to provisions of New York law. Jurisdictional Statement, p.9.

Although in this case federal statutory law is not challenged, the retirement policy at issue results from an interpretation of the federal statute as it applies to New York law. Averting to the interpretation of the federal statute involved, the New York Appellate Division also observed:

> On this appeal, we need not and do not decide whether this provision exempts from the scope of federal law only elected judges and not appointed judges. This is so, because the Administrative Board of the Courts, based upon the construction of this provision, has determined that only elected judges are exempted, and no party to this action urges us to adopt a different construction.
>
> Appellant's Appendix p. 26a.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or affirm.

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Dated: May 5, 1988